Taming the Social Media Giants: How far should the state go in regulating online content?

The frontier is ... the meeting point between savagery and civilization.

Frederick Jackson Turner, *The Significance of the Frontier in American History*

John Perry Barlow employed the theory of the American frontier to conceptualise the world of electronic communications that operates outside the controls of national governments. Social Media Giants are thus pioneers of electronic communication, endorsing globalisation, free speech and innovation.

The comparative analysis does not end here. The eulogised freedom and opportunity afforded by the frontier are inextricably connected with the risk and danger of a lawless terrain. Analogously, a complete absence of regulation in online communications leaves our most fundamental values vulnerable to abuse. The panoply of perils associated with social media encompasses the misuse of online platforms to execute serious crimes or terrorist attacks, the spreading of disinformation, and the use of social media for the purposes of sexual harassment and victimisation. And the list goes on.

In addressing these dangers, however, caution must be exercised. Shackling the Social Media Giants with heavy compliance rules is not a panacea. This is for three reasons.

First, efforts to tame the Giants may not result in the reduction of their power, but its relocation. The US, UK and Australian governments have opposed Facebook's intention to extend end-to-end encryption, currently available on WhatsApp, to Facebook messenger and Instagram. Social media platforms are rife with criminal activity and end-to-end encryption limits accessibility to online communications by law enforcers. These concerns are valid. Nevertheless, the purpose of end-to-end encryption is to protect privacy. State surveillance of all online private conversations is an ominous prospect. Government control over online communications is more terrifying still. Recently, the Iranian government shut down the internet in order to suppress widespread unrest in response to the

increase in fuel prices. Iran's current proposals for a state-owned Virtual Private Network will increase surveillance of online communications and make internet lockdowns more feasible. Consigning our data to private companies might be problematic. Placing it in the hands of state actors is catastrophic for democracy, free speech and human rights.

Secondly, strict content compliance rules could threaten the 'the global network'. Firewalls and national regulations diminish the ability of electronic communications to cross borders. States can also use legitimate concerns such as disinformation to conceal motives for greater state control of information. For Donald Trump, the concept of disinformation is both shield and a sword. It vindicates his threats to 'close up' the Internet with tighter regulation. Meanwhile, his manipulative use of the words "Fake News" veil the legitimacy of his critics' assertions. Onerous regulation, often prompted by illegitimate incentives, does not effectively tackle disinformation and leads to the fragmentation of the internet.

Thirdly, enforcing regulation of online content of social media faces practical challenges. Artificial Intelligence is not advanced enough to classify the delicate nuances of human expression in vast amounts of data. And the amount of human monitors required for such a task is unthinkable. In response to such concerns, the UK's recent White Paper recommends tackling "online harms" by imposing responsibility of the social media platforms for the risks inherent in their system design, rather than their online content. However, the more nebulous "harms" defined in the White Paper, such as extremism or hate speech, which are typified by their irrationality and inexplicability, are unlikely to be effectively addressed by a risk-assessment strategy. Burdensome structural requirements for online platforms also inhibit the ability of start-up social media companies to survive in the market. This leaves the Giants unchallenged in their market position and with little incentive to improve their services.

What then is the solution? It is more challenging to be sensitive than strident. Nonetheless, blanket provisions should be rejected in favour of a more nuanced approach. Legislative reform should be

tailored to specific concerns, rather than purporting to 'tame' social media in a broader sense. Addressing the full spectrum of concerns is beyond the scope of this essay, but three propositions are offered.

First, competition law should be updated to encompass the nature and structure of the social media market. The price-based test for abuse of a dominant position is clearly inadequate to control the Social Media Giants, who provide "free" services at the cost of accessing our data. The use of this data to influence our behaviour, particularly in political campaigns, has only recently come to the forefront of public concern. If several companies own the majority of the world's data, the abuse of power is inevitable. And this risk exists whether this power is harnessed by state actors through legal mechanisms, or sold to the highest bidder. The creation of a more expansive and diverse social media market would dilute the concentration of power and incentivise social media sites to improve their platforms.

Secondly, national governments should seek to cooperate on a global level in relation to all areas of electronic communications. Already, the Cloud Act of 2018 enables British Serious Crime Warrants concerning non-US citizens to be enforceable against US platforms. Cooperation should be expanded beyond the realm of serious crime. Global efforts to address online harms would also provide an antidote to internet fragmentation by the creation of legislation that prioritises equal treatment of all online communications.

Thirdly, critical thinking skills should become central to primary education. In the battle of "Fake News" the most powerful weapon is truth. Unfortunately, Jonathan Swift's remark that 'falsehood flies and the truth comes limping behind' remains as apt as ever. As we equip younger generations with coding languages and computer programming skills, we must also arm them with the right tools to combat disinformation.

States should not abandon the regulation of online content entirely. It is true that social media engenders opportunity, advancement and individuality. Yet in a virtual Wild West, wrought by untrammelled progress and unfettered power, destruction and chaos would also thrive. Focused legislative reform can address social media's faults, without undercutting its triumphs. Nonetheless, we remain standing on the frontier, and the greatest danger is the unknown.

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